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SUPREME COURT, U.S.

No. 04-150

IN THE

Supreme Court of the United States

CHARLESTON COUNTY, SOUTH CAROLINA, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONERS

BENJAMIN E. GRIFFITH
Griffith & Griffith
P.O. Drawer 1680
Cleveland, MS, 38732
(662) 843-6100

JOSEPH DAWSON, III
BERNARD E. FERRARA, JR.
W. KURT TAYLOR
Charleston County Attorney's Office
4045 Bridge View Drive
North Charleston, SC 29405-7464
(843) 958-4010

MARK A. PACKMAN
(Counsel of Record)
MICHAEL M. SEBOLD
Gilbert Heintz & Randolph LLP
1100 New York Ave., NW
Suite 700
Washington, DC 20005
(202) 772-2320

A. ARTHUR ROSENBLUM
P. O. Box 777
Charleston, SC 29402
(843) 577-3353

Counsel For Petitioners

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In their Petition for a Writ of Certiorari, Petitioners Charleston County, South Carolina, et al. (collectively, the "County") demonstrated that a conflict exists among the Court of Appeals regarding the burden of proof in a case brought under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. Specifically, certain Circuits hold that the question of whether differences in the voting behavior of black and white voters may be explained by differences in partisan affiliation should be addressed only when the court examines the "totality of circumstances" under Section 2. See, e.g., *Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995); *Goosby v. Town Bd. of Hempstead*, 180 F.3d 476, 493 (2d Cir. 1999). By contrast, the Fifth Circuit holds that this question should be addressed at an earlier stage, namely, when the court decides whether plaintiffs have proved the three "necessary preconditions" specified in *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

See League of United Latin American Citizens, Council No. 4434 v. Clements (LULAC), 999 F.2d 831 (5th Cir.1993) (en banc) *cert. denied*, 510 U.S. 1071 (1994).

I. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE SPLIT AMONG THE CIRCUITS REGARDING VOTING CAUSATION

In opposing the Petition, the Private Respondents claim that "There Is no Split Among the Circuits" regarding this issue. Brief for Private Respondents in Opposition ("Priv. Resp. Brief") at 12. The Private Respondents are simply wrong. Even a cursory comparison of *LULAC* with the other cases cited above demonstrates the existence of the conflict. Indeed, the Fourth Circuit has acknowledged the conflict both in this case, *see* App. 12a-13a, and in *Lewis v. Alamance County*, 99 F.3d 600, 615 (4th Cir. 1996) (noting that courts of appeals "are still in disagreement about the stage in the vote dilution inquiry in which causation evidence is appropriate").

The United States acknowledges the existence of the conflict, Brief for the United States in Opposition ("U.S. Brief") at 12, but argues that eight justices in *Gingles* "agreed that causation evidence was not the focus of the inquiry into the three *Gingles* preconditions." *Id.* at 10. To be sure, Justice Brennan and three other Justices took the position that causation is irrelevant to this inquiry. But it is far from clear that Justice O'Connor and the three Justices who joined her opinion agreed. On the one hand, Justice O'Connor's opinion states that

> Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for

> electoral success, I agree that defendants cannot rebut this showing by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters. I do not agree, however, that such evidence can never affect the overall vote dilution inquiry.

478 U.S. at 101. On the other hand, the opinion also stated that

> Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates.

Id.

The court in *LULAC* certainly did not read *Gingles* as preventing the consideration of voting causation at the precondition stage. *See* 999 F.2d at 850-61. Nor did the Sixth Circuit in *Clarke v. City of Cincinnati*, which considered whether incumbency could be construed as a cause of white bloc voting. 40 F.3d 807, 812-14 (6th Cir. 1994). The Court in that case found that a desire to protect incumbents did not constitute a racial cause of white voting patterns, and thus the claim failed at the precondition stage. *Id.* at 813-14.

Thus, a split in the Circuits exists, and Justice O'Connor's opinion in *Gingles* does not resolve it. Accordingly, this Court should grant certiorari to resolve the conflict among the circuits.

Moreover, contrary to what Respondents argue, the question of whether causation is considered as part of the inquiry into the *Gingles* preconditions or as part of the inquiry into the totality of circumstance is a critical one. The United States argues that this Court should follow other Circuits that have refused to consider voting causation in the context of the *Gingles* preconditions. It argues that because the preconditions are merely a preliminary matter, any discussion of voting causation should be postponed until the totality of the circumstances inquiry. U.S. Brief at 12. However, this is a false assumption. Courts do not treat the *Gingles* preconditions as a mere preliminary matter, and the United States admits as much, arguing in another portion of its brief that the preconditions establish "a strong presumption" of liability. *See* U.S. Brief at 3. The United States is simply trying to have it both ways.

The District Court below certainly did not treat the *Gingles* preconditions as a preliminary matter, but as near conclusive proof of vote dilution. *See* App. 39a. Similarly, other Circuits have held that it will only be in a most unusual case where satisfaction of the preconditions does not result in liability. *See, e.g., Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1123 (3d Cir.1993); *Teague v. Attala County*, 92 F.3d 283, 293 (5th Cir. 1996). In fact, in three of the four Court of Appeals decisions the United States cites in its brief hold that the preconditions themselves all but establish liability. *See Sanchez v. Colorado*, 97 F.3d 1303, 1310 (10th Cir. 1996) (preconditions create an inference of discrimination); *Goosby*, 180 F.3d at 502-03 (accord); *Uno*, 72 F.3d at 983 (second and third *Gingles* preconditions

constitute the "surest indication of race-conscious politics" – citation omitted); *cf., Nipper v. Smith*, 39 F.3d 1494, 1514 (11th Cir. 1994) (it may be true that preconditions almost always coincide with liability, but court should consider totality of the circumstances), *citing Johnson v. DeGrandy*, 512 U.S. 997, 1011 (1994).

The protections afforded by Section 2 extend only to those defeats experienced by minority voters "on account of race or color." *LULAC*, 999 F.2d at 850. Because courts essentially fix liability based on the *Gingles* preconditions, Section 2 requires that plaintiffs establish white bloc voting that is "legally significant," and which occurred "on account of race." *See id.* at 850-61; *see also Clarke*, 40 F.3d at 813-14. Therefore, it is necessary that the court consider non-racial causes for white bloc voting in context of the *Gingles* preconditions.

II. THE INSTANT CASE PROPERLY PRESENTS THE CAUSATION ISSUE

In its Petition, the County further demonstrated that under *LULAC*, it is the plaintiff in a Section 2 case (here, the United States and the Private Respondents) that bears the burden of negating partisanship as the cause of differences in the voting behavior of blacks and whites. The reason is that the plaintiff bears the burden of proving the existence of the *Gingles* preconditions, and, absent proof that such differences are "on account of race," 42 U.S.C. § 1973, plaintiff has not met that burden.

The United States argues that "[t]he question whether causation is properly considered in the Section 2 analysis as an aspect of the totality of the circumstances, or whether instead it should be viewed as evidence bearing on whether the *Gingles* preconditions have been proven, is not presented

by this case." *Id.* at 13. The United States reasons that both courts below rejected the County's argument that differences in black and white voting behavior resulted from partisanship, not race, and that, consequently, "the stage of the analysis at which partisan causation is considered does not matter in this case ...." *Id.* at 14.

The flaw in these arguments is the same as the flaw in the reasoning of the courts below. Like the lower courts, *see* App. 10a-11a, 20a-22a; App. 83a-97a, Respondents improperly place the burden of proof on the County. Thus, the United States claims that Petitioners "failed to carry [the] burden" of "demonstrat[ing] that partisanship differences (or some other race-neutral factor) better explain voting patterns than does race." U.S. Brief at 14; *see also* Priv. Resp. Brief at 10 ("the County's evidence . . . failed to show that partisanship, rather than race, was the cause of white bloc voting"). The United States goes on to argue that the conclusions of the lower courts that "that petitioners were unable to show" that partisanship, rather than race, caused the losses of minority-preferred candidates "is sufficient to resolve the case." *Id.* at 16. However, consistent with *LULAC*, it was the Respondents' burden to negate partisanship, not the County's burden to prove it. *See* 999 F.2d at 859-61. Thus, the court below erred in assigning the County this burden of proof.

Moreover, the fact that the courts below could not separate the partisan causes of white bloc voting patterns from any alleged racial ones is a fact that favors the County, not the Respondents. *See LULAC*, 999 F.2d at 855 (race must be shown to be the "the predominant determinant of political preference"); *see also* S. Rep. No. 417, 97th Cong., 2nd Sess., *reprinted in* 1982 U.S.C.C.A.N. 177, 211. The Court of Appeals found that partisanship and race were hopelessly intertwined, App. 20a, but ultimately held only

that race still appears to "play a role" in voting patterns in Charleston County." App. 22a. Similarly, the District Court expressed severe doubts whether it could ever be proven whether race or partisanship was the predominant cause of white bloc voting. The Court rejected the possibility that the parties could "adequately identify a singular or even dominant cause of a community's corporate voting behavior." App. 88a. The Court could not determine whether voting causation in this case was driven by race or ideology, or some combination of both. *See id.* at 92.

As Respondents had the burden of negating partisanship, and because neither of the courts below indicated that Respondents met their burden of proving that race was the predominant reason for white bloc voting, Respondents' argument that they negated partisanship has no merit.

Moreover, while Petitioners do not seek review of the factual findings below, they do point out that Respondents have in several instances inaccurately summarized the record with respect to evidence that would demonstrate partisanship, rather than race, was the reason for white bloc voting. These include the following:

- Both Respondents misrepresent black electoral success in Charleston County. Private Respondents allege the complete exclusion of black candidates from the nine-member County Council during the 1990s. See Priv. Resp. Brief at 3. The United States is somewhat more charitable, alleging the presence of only one minority on the County Council since 1990. U.S. Brief at 5. Both Respondents misstate the record. Lonnie Hamilton, a black democrat, was re-elected to the County Council in 1990 and served to 1994. See App. 42a n.13. Timothy Scott, a black Republican, was elected to the County

Council in 1995, and has served there ever since. See App. 191a-193a.

- The Respondents also fail to describe accurately the degree of minority success in winning elections to the Charleston County School Board. The United States relies on the report of its expert, Dr. Arrington, to argue extreme racial polarization in County School Board elections. However, this report shows that between 1984 and 2000, fully half of the minority-preferred candidates running for the School Board were elected, and that by the year 2000, a majority of the school board was comprised of blacks. *See* Arrington Report Tables 14 and 15, Trial Record ("T.R.") at 1017-18, reproduced at Reply App. 1a-2a; *see also* App. 67a.

- The United States also grossly understates the degree of "decreased minority support" for two Republican candidates for the County Council after they switched from the Democratic party. U.S. Brief at 15. Actually, these candidates each received over 90 percent of the black vote when running as a Democrat but less than 5 percent when running as a Republican.

- Private Respondents cite the testimony of Tim Scott to suggest that "partisanship was not part of [his] election." *See* Priv. Resp. Brief at 4, 9. Actually, Mr. Scott was only making the point that he tried to get people to vote for him, not his party. *See* T.R. at 699, Trial Transcript ("Tr.") at 2368, reproduced at Reply App. 3a. However, at the same time, Private Respondents attack the Republicans for making "special and 'unprecedented' efforts to insure that [Scott] was elected." *See* Priv. Resp. Brief at 4.

Private Respondents cannot have it both ways. They cannot deny that Scott's election was the result of partisanship when they also argue it was result of extensive partisan Republican efforts.

- The United States falsely argues that the County's experts simply failed to collect partisanship data. Citing the trial record, they argue that the County's experts "conceded that they could have, but did not, collect the necessary data to measure for partisanship, and therefore they could not perform causal analyses isolating the effects of partisanship on voting behavior." *See* U.S. Brief at 14. However, this simply misrepresents the record. In one of the cited excerpts, the County's expert, Dr. Weber, explains that the data was simply not available because plaintiffs brought their complaint too long after the most recent election. See T.R. at 646-47, Tr. 2060-61, reproduced at Reply App. 4a-5a. Two of the other excerpts the United States cites, Tr. 2904-2905, 2908-2909, are not found in the record on appeal.

In short, Respondents have failed to describe the evidence accurately and have failed (like the courts below) to allocate the burden of proof properly. Accordingly, the judgments below should not be permitted to stand.

III. PRIVATE RESPONDENTS CANNOT ARGUE REJECTED CLAIMS OF INTENTIONAL DISCRIMINATION

The vast majority of Private Respondents' brief is dedicated to alleging intentional discrimination dating back from 35 to 50 years ago. *See* Priv. Resp. Brief at 5-8, 14-16. Private Respondents argue that because there was allegedly intentional discrimination 35 to 50 years ago, there must be

vote dilution today. However, these very same allegations of intentional discrimination were rejected by the District Court below, *see* App. 97a-101a. The Fourth Circuit did not reverse on this issue, *see* App. 10a, and Private Respondents have chosen not to appeal. As such, these arguments are not properly before the Court, and they should be disregarded. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994).

CONCLUSION

For the foregoing reasons as well as those set forth in the petition, the County respectfully requests that this Court grant the petition for certiorari and reverse the judgment below.

Dated: November 8, 2004 Respectfully submitted,

BENJAMIN E. GRIFFITH
Griffith & Griffith
P.O. Drawer 1680
Cleveland, MS, 38732
(662) 843-6100

MARK A. PACKMAN
Counsel of Record
MICHAEL M. SEBOLD
Gilbert Heintz & Randolph LLP
1100 New York Ave., NW
Suite 700
Washington, DC 20005
(202) 772-2320

JOSEPH DAWSON, III
BERNARD E. FERRARA, JR.
W. KURT TAYLOR
Charleston County Attorney's Office
4045 Bridge View Drive
North Charleston, SC 29405-7464
(843) 958-4010

A. ARTHUR ROSENBLUM
P. O. Box 777
Charleston, SC 29402
(843) 577-3353

Counsel for Petitioners

APPENDIX

Table 14
Vote of Black Voters and White Voters for Preferred Candidate of Black Voters for School Board 1984-2000 for Single-Seat Election Contests

Year	District Name or Number A Shown on Returns	% of Black Votes for Preferred Candidate (cohesion)	% of White Votes for Preferred Candidate by Blacks	Race of Candidate Preferred by Black Voters	Was Candidate Peferred by Blacks Defeated?
1984	3	89%	26%	Black	Yes
1986	1	99	28	Black	Yes
1986	3	92	26	Black	Yes
1986	4	60	54	White	No
1988	1	82	26	Black	Yes
1990	2	56	66	White	No
1990	4	68	8	Black	Yes
1992	City	53	38	White	Yes
1994	10	76	77	Black	No
1994	11	63	59	White	No
1994	12	89	38	Black	Yes
1994	13	76	45	White	No
1996	1	47	30	White	Yes
1998	1	71	22	Black	No
1998	2	61	8	Black	No
1998	3	67	39	Black	No
1998	4	98	32	Black	No
2000	4	73	40	White	Yes

Table 15
Vote of Black Voters and White Voters for Preferred Candidate of Black Voters for School Board 1984-2000 for Double-Seat Election Contests

Year	District Name or Number A Shown on Returns	% of Black Votes for Preferred Candidate (cohesion)	% of White Votes for Preferred Candidate by Blacks	Race of Candidate Preferred by Black Voters	Was Candidate Peferred by Blacks Defeated?
1984	1	67% 21	38% 26	Black White	No Yes
1984	2	37 36	11 6	Black Black	Yes Yes
1988	2	52 21	18 31	Black White	Yes No
1992	North	45 35	28 42	Black White	No No
1992	West	44 22	16 26	Black White	Yes No
1996	2	30 22	22 33	White White	Yes No
1996	3	52 21	18 34	Black White	Yes No
2000	2	44 23	9 38	Black White	Yes No
2000	3	36 20	22 8	Black Black	No Yes

that correct?
A If partisanship was the only thing driving the rationale why those black -- the 31% of the blacks that voted for me voted for me because of partisanship?
Q No. Listen, I said if --
A I'm trying.
Q -- if partisanship were driving that election, you would not have gotten those Democratic black votes, would you?
A Oh, I see what you're saying now. No, you're wrong. I would have gotten those anyway. The reason I got the votes is because I went after the votes.
What partisanship does is it eliminates the opportunity to get many more of the votes. When you're running for a special election, if you're the only person on the ballot -- in spite of being a Republican, I had white Republicans voting for me.
Q Partisanship was not the only thing that was working for you, because you got a number of black Democratic votes; isn't that a part of it?
A I would say that partisanship was not a part of the election. Any time you're on the ballot by yourself a lot of things come into play.
Q Now, the longer you stay in office, the more people know about you as an elected official; isn't that correct?
A That's correct.

and which candidates they voted for?
A You do it in two ways: You can do it through the recall
mechanism where you interview people after the election and
ask them for whom did they vote, having ascertained both
their race and party identification; but you can also conduct
exit polls.
Q Right.
A So you are basically working only with the pool of voters
that voted that day. And what you would collect in that is
the race of the voter as well as the party identification.
Q And in those interviews, whether they're done as exit
polls or whether they're done as subsequent interviews
sometime after the election, you can -- you can ask the voter
why they voted for a Democrat or why they voted for a
Republican, correct?
A Yes.
Q And in reaching your opinion in this case that
partisanship is a better explanation than race, isn't it true
that prior to filing your initial, supplemental, and rebuttal
reports, you did not do this type of survey work?
A I believe there was no such data available to any of the
experts in this case.
Q And isn't it -- well, you were the expert that is saying
that partisanship is a better explanation than race, aren't
you, sir?

A Right, right, right, right.
Q And my question to you, again, is: In reaching that opinion, isn't it true that you did not do that type of survey work?
A I did not do that survey work, and I was not aware that anyone else had done that survey work, say, at the time of the '98 election or the 2000 election.
So Dr. Arrington, Dr. Ruoff, and I could not engage in that analysis because no such data exists.
Q And you did not conduct survey work to do interviews with voters at the time of your initial report, your supplemental report, or your rebuttal report to -- to ask voters interview questions pertaining to partisanship or race, did you, sir?
A No.
And the County could not have done that, because you did not file this case until early 2001, so that's too far away from the 2000 election, and it's very far away from the 1998 election, sir.
So it would be a very -- I would never advise any client to spend the money to engage in that kind of survey research because you simply wouldn't get good answers from the respondents because it's too far from the event and the recollection will have been poisoned, in effect, by lots of other things.
Q When were you retained?